

**Michigan Supreme Court**  
State Court Administrative Office  
309 N. Washington Square, P. O. Box 30048  
Lansing, Michigan 48909  
(517) 373-4835  
John D. Ferry, Jr., State Court Administrator

**M E M O R A N D U M**

**DATE:** May 28, 2002

**TO:** Chief Circuit and District Court Judges  
**cc:** Judges, Court Administrators, and Clerks of Court

**FROM:** John D. Ferry, Jr.

**SUBJ:** Appointment of Court Officers re: SCAO Administrative Memorandum 2002-04

---

On April 26, 2002, appointment procedures for both court employee and independent contractor court officers were sent to you as SCAO Administrative Memorandum 2002-04 (<http://courts.michigan.gov/scao/resources/other/scaoadm/2002/2002-04.pdf>). Enclosed is important information regarding the inherent risks and issues associated with employee and independent contractor classifications which courts should carefully consider before determining which option is in their best interest.

Questions can be directed to John Ross at 517-373-9525 or [rossj@jud.state.mi.us](mailto:rossj@jud.state.mi.us).

JOHN F. BRADY  
THOMAS M.J. HATHAWAY  
THOMAS P. BRADY  
DANIEL J. BRETZ  
CONNIE M. CESSANTE  
DAVID A. HARDESTY  
PAUL W. COUGHENOUR  
JEFFERY A. STEELE  
TRACY A. LEAHY  
DAVID M. CESSANTE

**BRADY HATHAWAY**  
PROFESSIONAL CORPORATION  
ATTORNEYS AND COUNSELORS  
1330 BUHL BUILDING  
535 GRISWOLD STREET  
DETROIT, MICHIGAN 48226-3602

TELEPHONE  
(313) 965-3700  
  
TELECOPIER  
(313) 965-2830

April 30, 2002

**PRIVILEGED AND CONFIDENTIAL  
ATTORNEY CLIENT PRIVILEGE**

John D. Ferry, Jr.  
State Court Administrator  
309 N. Washington Square  
P.O. Box 30048  
Lansing, MI 48909

Re: Court Officer Status

Dear Mr. Ferry:

MCR3.106 provides that Court Officers may be employees or independent contractors. The decision whether to classify Court Officers as employees or independent contractors is an important one that courts should consider carefully. Courts that retain the services of Court Officers without treating them as employees do not need to provide the Court Officers certain employment-related protections, such as workers' compensation or unemployment insurance. While these are attractive incentives for many businesses, there is a tremendous downside if a court or administrative agency concludes that Court Officers were improperly classified as independent contractors. Such a finding could result in orders requiring the employer to pay, *inter alia*, back wages, overtime pay, back taxes, workers' compensation benefits and/or substantial penalties. Moreover, because independent contractor status presumes a large degree independence, crafting a sustainable independent contractor relationship involves the loss of several of the controls an employer would otherwise be able to exercise over an employee.

The following discussion should assist you and each individual Court in making the difficult decision whether to classify Court Officers as employees or independent contractors.

The assumption underlying an independent contractor relationship is that two entities, in this case the court and a Court Officer, are separate businesses operating at arms length. The relationship between a court and an independent contractor is and must remain task specific and episodic. Independent contractors can agree to perform or refuse to perform each requested assignment, meaning that the court cannot count on or require the independent contractor to be there to perform any specific task he or she has not specifically agreed to perform. Moreover, while the court does have control over the outcome of the independent contractor's work, the court's ability to control the manner and means by which that work is performed is limited.

## BRADY HATHAWAY

John Ferry, Jr.  
April 30, 2002  
Page 2

Courts wishing to establish specific rules with which Court Officers must comply or require Court Officers to be available for duty at given times are therefore advised to establish an employer-employee relationship, not an independent contractor relationship.

In exchange for giving up control over and the ability to count on the continued presence of a specific Court Officer, courts establishing legitimate independent contractor relationships do not need to withhold payroll taxes from or provide certain employment-related benefits to independent contractors. For example, independent contractors need not be paid overtime, a minimum wage and are ineligible for workers compensation or unemployment benefits. A true independent contractor relationship also reduces the risk that a court will be found vicariously liable for a Court Officer's negligence. *Janice v Hondzinski*, 176 Mich App 49, 53 (1989).

Avoidance of these and other employment-related laws and regulations is risky. There are numerous opportunities to challenge, and several state and federal agencies have an incentive to challenge independent contractor status. The IRS, for example, issued a news release in 1995 announcing that it would focus future enforcement efforts on employers that misclassify employees as independent contractors. Similar challenges can and often do come from federal and state agencies charged with enforcing wage and hour laws. Other entrees for challenge include employees seeking workers' compensation or unemployment benefits, disgruntled workers seeking to claim employment discrimination or overtime compensation, plaintiffs seeking to pursue "deep pockets" under a vicarious liability theory, and unions seeking to include putative independent contractors in their bargaining units. See, e.g., *In Re Detroit Judicial Counsel*, Case No. C99 B-24 (December 16, 1999) (The Michigan Employment Relations Commission agreed with a union's position that Court Officers were employees, not Independent Contractors, and could be included in the bargaining unit). Courts that are found to have misclassified employees as independent contractors could face, *inter alia*, back wages, overtime, taxes, workers' compensation benefits and substantial penalties.

Unfortunately, there is no clear test for determining whether individuals are employees or independent contractors. Courts and administrative agencies have devised different, sometimes inconsistent multi-factor balancing tests to guide the determination. The common thread that is included in almost all of these tests is control. The more control a court has over the Court Officers, the more likely it is that they will be found to be employees. It is not simply the control an entity actually exercises over an individual that matters; it is the control a court retains the right to exercise. **26 CFR §§ 31.3121(d)-1(c); 31.3306(i)-1; and 31.3401(c)-1.**

The following factors, though not used by every court and agency, should be closely evaluated in determining whether an individual is an independent contractor or an employee:

1. **Instructions.** Retaining the right to require the Court Officers to comply with specific instructions or rules not set forth in a statute or Court Rule is an indication of an employer-employee relationship.

## BRADY HATHAWAY

John Ferry, Jr.  
April 30, 2002  
Page 3

2.     **Training.** Training Court Officers, teaching them how to perform their tasks, counseling Court Officers on how to improve their performance or disciplining Court Officers are all indications of an employer-employee relationship.
3.     **Integration.** If the Court Officer's services are deemed essential to the court's business, it is an indication of an employer-employee relationship. If the tasks they perform are deemed ancillary to the court's business, it is an indication of an independent contractor relationship.
4.     **Services rendered personally.** If the services must be rendered by the Court Officer him or herself, as opposed to being performed by someone the Court Officer hires to perform the task, it is an indication of an employer-employee relationship.
5.     **Hiring, supervising and paying assistants.** It is an indication of an independent contractor relationship if the Court Officer can hire, supervise and pay assistants.
6.     **Continuing relationship.** If a continuing relationship exists between the Court Officer and the court, if the court requires Court Officers to be available to perform work at any given time, or if the Court Officer's contract is automatically renewed, it is an indication of an employer-employee relationship.
7.     **Setting work hours.** If the court can or does set the Court Officer's work hours, it is a strong indication of an employer-employee relationship.
8.     **Full time requirements.** Requiring Court Officers to work full time or devote his or her services exclusively to the court is an indication of an employer-employee relationship.
9.     **Doing work on business premises.** Requiring Court Officers to work on the court's premises is an indication of an employer-employee relationship.
10.    **Establishing the order or sequence of work.** If the court directs or retains the right to direct or sequence or order of the Court Officer's work or duties, it is an indication of an employer-employee relationship.
11.    **Oral or written reports.** If the Court Officer is required to give oral or written reports to the court, it is an indication of an employer-employee relationship.
12.    **Payment by hour, week or month.** Paying a Court Officer by the hour, week or month is a strong indication of an employer-employee relationship. Payment by the job indicates an independent contractor relationship.

## BRADY HATHAWAY

John Ferry, Jr.  
April 30, 2002  
Page 4

13. **Payment of business and/or traveling expenses.** Paying for a Court Officer's travel, parking or business expenses is an indication of an employer-employee relationship.
14. **Furnishing tools.** Supplying Court Officers with tools or equipment is an indication of an employer-employee relationship.
15. **Significant investment.** If Court Officers have to personally invest in the tools, equipment or facilities used to perform their tasks, it is an indication of an independent contractor relationship.
16. **Realization of profit or loss.** If Court Officers may recognize a profit or loss, other than a wage loss, it is an indication of an independent contractor relationship.
17. **Working for more than one firm or court.** If the Court Officer performs more than *de minimis* services for a multiple of unrelated persons, courts or firms, it is an indication of an independent contractor relationship.
18. **Making services available to the general public.** If the Court Officer makes his or her services available to the general public, it is an indication of an independent contractor relationship.
19. **Right to discharge.** If the court has the right to terminate the relationship without liability, it is an indication of an employer-employee relationship.
20. **Right to quit.** If the Court Officer can terminate the relationship without liability, it is an indication of an employer-employee relationship.
21. **Economic Reality.** It will indicate an employer-employee relationship if the Court Officers rely exclusively on one court for the income they need to live.
22. **Degree of Skill and Independent Judgment Required.** The more skill and independent judgment Court Officers must use, or are permitted to use, the more likely it is that the relationship will be considered an independent contractor relationship.

*See, e.g., Nationwide Mutual Ins Co v Darden*, 503 US 318 (1992); *Oxley v Dept of Military Affairs*, 460 Mich 536, (1999); *Simpson v Ernst & Young*, 100 F3d 436 (CA 6, 1996); *Sanderson, III v United States*, 862 F Supp 196, 200 (WD Ohio, 1994); *IRS Revenue Rule 87-41*.

## BRADY HATHAWAY

John Ferry, Jr.  
April 30, 2002  
Page 5

Although the ability to control is the most important factor, no element is given decisive weight. See *NLRB v United Ins Co of America*, 390 US 254, 258 (1968); *Broussard v LH Bossier, Inc*, 789 F2d 1158, 1160-1161 (CA 5, 1986). See also *Kidder v Miller-Davis Co*, 455 Mich 25 (1997); *Tucker v Newaygo Co*, 189 Mich App 637, 639-640 (1991).

Courts have deemed it *probative of an employer-employee relationship* if the entity involved retains the right to (1) hire and fire; (2) control the time and place the worker reported to work; (3) train workers; (4) cancel an individual's contract; (5) require the worker to work exclusively for one entity; (6) control who works for the individual; (7) require specific billing procedures; or (7) discipline an individual. Other factors suggesting an employer-employee relationship are if the worker (1) does not own the equipment necessary to do the job; (2) is required to maintain radio contact with the entity; (3) depends on the job in question to earn a living; (4) provides a service that is integral to the entity; or (5) is paid by the hour. See, e.g., *Henderson v Inter-Chem Coal Co, Inc*, 2 WH Cases 695 (CA 10, 1995); *Burry v National Trailer Convoy, Inc*, 16 WH Cases 713 (CA 6, 1964); *Detroit v Salaried Physicians Professional Association, UAW*, 165 Mich App 142 (1987) (physicians were employees even though the city did not oversee their work because the city set the doctors' hours, controlled the number of patients they saw and where the doctors' work was integral to the city's work of providing a hospital); *White v Central Transport, Inc*, 150 Mich 129 (1986) (despite an independent contractor agreement, truck drivers were employees because the business controlled the drivers' routes, scheduling, rates and retained the power to designate any driver as unacceptable).

Federal and state courts found it *probative of an independent contractor relationship* where workers: (1) own and maintain their own equipment or vehicles; (2) hold themselves out as free-lance workers that use their skills for a variety of businesses; (3) conduct their own advertising and pay their own expenses; (4) are responsible for paying their own insurance premiums and taxes; (5) can supply their own assistants and work for other companies; (6) are permitted to choose their own routes and destinations; (7) have a high degree of skill; and (8) where the worker is taking a financial risk in performing a particular job. *Henderson, supra*; *Everman v Mary Kay Cosmetics, Inc*, 967 F2d 1158 (CA 6, 1992); *Broussard v LH Bossier, Inc*, 789 F2d 1158 (CA 5, 1986). See, e.g., *Amerisure v Time Auto*, 196 Mich App 569, 575 (1992) (transport drivers that own their own equipment, set their own hours and could refuse loads were independent contractors); *Williams v Cleveland Cliffs*, 190 Mich App 624, 628 (1991) (driver who owned and maintained his own truck, paid his own insurance, paid for his own advertising and published his own rates was an independent contractor).

The model independent contractor agreement that is enclosed in this package gives courts a great degree of control over the *Agreement* itself. The *Agreement* gives the court the right to decide how the *Agreement* is construed, whether to offer an extension, whether a Court Officer has violated it and whether to terminate it. However, mindful of the legal principles outlined above, and also fearful that a court or administrative agency may believe that Court Officers perform a service essential to the courts' function, the model *Agreement* has been drafted in a manner that minimizes the control the individual courts have over the Court Officers themselves.

## BRADY HATHAWAY

John Ferry, Jr.  
April 30, 2002  
Page 6

Thus, for example, the Agreement specifically provides that Court Officers may choose their own hours, hire their own employees, determine their own operating procedure, work for other courts, make contracts with or provide services to other entities and train their own employees, agents and subcontractors. The Agreement also requires Court Officers to pay their own taxes, pay their own workers' compensation and unemployment insurance, buy their own tools and provide their own insurance.

Any alteration of these terms, whether they are explicitly written into the Agreement or simply appear in practice, could cause a court or administrative agency to determine that the relationship is really an employer-employee relationship. Courts should consult an attorney before making any change to the Agreement. It should also be clear that the Agreement will not, by itself, guarantee that a court or administrative agency will conclude that an independent contractor relationship truly exists. Nor will the Agreement be the only criterion a court or administrative agency will use in making this determination. The analysis is decidedly fact-based, such that the *actual practices* of each individual relationship will be reviewed. That means that each individual court should beware of imposing (or permitting court employees to impose) more requirements or controls than the Agreement creates. Thus, for example, requiring Court Officers to check in every day, creating a schedule for Court Officers, giving preference to Court Officers due to their loyalty to a particular court or length of service, *et. cetera*, could defeat the goal of the Agreement and inspire a ruling that the Court Officers are really employees. Courts should also make it clear to the Court Officers that they are absolutely forbidden from representing themselves as employees or conducting themselves in a manner that would make them appear like they are employees.

The foregoing discussion is designed to provide an overview of the issues surrounding the decision whether to classify Court Officers as employees or independent contractors. Courts that have questions whether their unique circumstances support the independent contractor classification should contact me or another employment attorney to discuss the matter. I also advise that Courts contact me or another employment attorney before making any alterations to the model forms, agreements and documents that have been sent under separate cover.

Very truly yours,

**BRADY HATHAWAY BRADY & BRETZ, P.C.**

/s/

Jeffrey A. Steele

JAS/jr